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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO AGUIRRE GARCIA, Defendant and Appellant.	E052639 (Super.Ct.No. RIF10005410) OPINION

APPEAL from the Superior Court of Riverside County. Harry (Skip) A. Staley, Judge. (Retired judge of the Kern Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part; reversed in part with directions.

Jonathan E. Demson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, James D. Dutton and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Francisco Aguirre Garcia guilty of robbery (Pen. Code, § 211)[1] against a person over the age of 65 (§ 667.9, subd. (a)).[2] Defendant subsequently admitted that he had sustained a prior prison term (§ 667.5, subd. (b)), and a prior strike conviction (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). Defendant was sentenced to a total term of eight years in state prison with credit for time served.

On appeal, defendant contends his conviction must be reversed because the trial court's failure to conduct an adequate *Marsden*[3] inquiry in response to his motion for a new trial on grounds of ineffective assistance of counsel was in error and in violation of his constitutional rights to effective assistance of counsel and a fair trial. We agree that the matter must be remanded for further proceedings.

I

FACTUAL BACKGROUND

On May 16, 2010, the then 77-year-old victim was hanging out behind a market in the Rubidoux area of Riverside County, when defendant, also known as "Poncho," arrived and asked the victim for alcohol or drugs. Defendant and the victim had known each other for about three to four years and had often spent time together behind the market. The victim told defendant that he did not have anything because he had already

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The jury found not true the enhancement allegation that defendant personally used a deadly or dangerous weapon (§ 12022, subd. (b)(1)) in the commission of the crime.

[3] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

consumed all the alcohol he had and shot up his heroin earlier that morning. Defendant told the victim that he did not believe him. The victim then followed defendant into a nearby alley because the defendant told the victim that he had some beer. Thereafter, while holding a knife to the victim's throat, defendant searched the victim and took his wallet and two watches.

After defendant left, the victim flagged down Riverside County Sheriff's Deputy Murphy, who was patrolling the area and reported the incident. While Deputy Murphy was talking to the victim, Riverside County Sheriff's Deputy Morando, who knew defendant from prior contacts, saw defendant walking down the street about a block away.

Defendant began walking faster as Deputy Morando approached. Deputy Morando yelled at defendant to stop, but defendant continued into a residence. Deputy Morando followed defendant through the house and into the backyard where defendant was found hiding. Defendant refused to obey Deputy Morando's orders, resulting in defendant being "tazed" twice by the deputy.

Defendant eventually complied and was taken into custody. Deputy Morando found the victim's wallet on the ground near where defendant was standing, and two watches on defendant's person. Defendant was not found in possession of any weapons. The victim identified defendant as the man who had robbed him, after the victim was taken to the area where defendant had been detained.

Defendant claimed that the victim had left his jacket in the alley while he went to buy beer. The victim never returned, so he put on the jacket because he was cold and did not want to leave it in the alley. Defendant did not think the victim would mind because they were friends. Defendant noticed a wallet, watches, and a syringe in the pockets of the jacket. Defendant then headed to his brother's house and claimed that he did not hear the deputy's commands. He hid from the deputy because of the syringe in the jacket pocket, and because he was accustomed to being harassed by the police.

II

DISCUSSION

Defendant contends that the trial court erred by failing to hold a *Marsden* hearing in response to his request to file a motion for a new trial on grounds of ineffective assistance of counsel. He claims the judgment must be reversed and the case remanded so that the trial court may hold a postconviction *Marsden* hearing. The People disagree, arguing defendant never clearly requested a substitute attorney and, therefore, never triggered the trial court's *Marsden* obligations. In the alternative, the People claim any error was harmless and, if not harmless, the matter should be remanded for the limited purpose of holding a *Marsden* hearing.

A. *Additional Background*

At the sentencing hearing, the following colloquy occurred between defense counsel, the trial court, and the prosecutor:

"THE COURT: Counsel prepared to go forward on the sentencing?

"[DEFENSE COUNSEL]: Actually, Your Honor, [defendant] is requesting a motion for a new trial.

"THE COURT: I'll hear that first, then.

"[DEFENSE COUNSEL]: Okay. He wants a motion for new trial based on ineffective assistance of counsel, so I would have to declare a conflict and have [a conflict attorney] appointed.

"THE COURT: Any comments from the People?

"[THE PROSECUTOR]: Well, Your Honor, the People don't feel that there was ineffective assistance of counsel, however, if [defense counsel] has to declare a conflict, I guess at this point we'd have to get a conflict's attorney.

"THE COURT: It seems to me there would have to be some grounds stated.

"[THE PROSECUTOR]: And, Your Honor, the People would also request a written motion, but I guess if that's based on ineffective assistance of counsel—

"THE COURT: Assuming if we get that far we'll get one, but I don't know that just the bold assertion of ineffective assistance of counsel, essentially after, unfortunate for the defendant, verdicts c[a]me back is enough to trigger that.

"Do you have some basis to feel that he received ineffective representation?

"[DEFENSE COUNSEL]: During jury selection, there was a potential juror who made the statement that by virtue of having a teardrop tattoo, the defendant had killed somebody, and [defendant] felt that he was prejudiced at that point, and I didn't make a motion to have a new jury panel.

"THE COURT: Any further comments from the People?

"[THE PROSECUTOR]: Your Honor, I believe that juror, I know we didn't bring in a new panel, but I believe that juror was kicked.

"THE COURT: All right. And I assume part of the assertion is that the other jurors heard that?

"[DEFENSE COUNSEL]: Correct.

"THE COURT: Anything further on the request to have conflict counsel appointed on those grounds?

"[DEFENSE COUNSEL]: It's also [defendant]'s contention that the victim that testified was under the influence at the time he testified and was allowed to testify in that state.

"THE COURT: Are there any other grounds the defendant is asserting?

"[DEFENSE COUNSEL]: That's it.

"THE COURT: Any further comments from the People?

"[DEFENSE COUNSEL]: No, Your Honor.

"THE COURT: Okay. Well, the Court is going to deny the request to appoint independent counsel to raise those grounds. The Court feels those are at this point frivolous, and the request is denied."

The trial court thereafter proceeded with sentencing, ultimately sentencing defendant to a total of eight years in state prison.

B. *Discussion*

When a defendant with appointed counsel seeks new counsel on the grounds of inadequate representation, the court must allow the defendant to explain the bases for his contentions and describe specific instances of ineffective representation. (*Marsden, supra*, 2 Cal.3d 118, 124; *People v. Hart* (1999) 20 Cal.4th 546, 603.) "'"Although no formal motion is necessary, there must be 'at least some clear indication by defendant that he wants a substitute attorney.'" [Citations.]'" (*People v. Richardson* (2009) 171 Cal.App.4th 479, 484 (*Richardson*); see also *People v. Lucky* (1988) 45 Cal.3d 259, 281 ["a trial court's duty to permit a defendant to state his reasons for dissatisfaction with his attorney arises when the defendant in some manner moves to discharge his current counsel"].) A trial court's failure to hear personally from the defendant and actively inquire into the basis for his contention of ineffective assistance of counsel constitutes reversible, prejudicial error. (*People v. Stewart* (1985) 171 Cal.App.3d 388, 396-398, disapproved of on other grounds in *People v. Smith* (1993) 6 Cal.4th 684, 696, 693 (*Smith*).)

In *Smith*, *supra*, 6 Cal.4th 684, our Supreme Court explained a *Marsden* motion may be brought not only during trial, but also after trial; for example, prior to moving for a new trial or to withdraw a plea on the basis of inadequate representation. (*Smith*, at pp. 692-696.) Specifically, the *Smith* court addressed whether different standards apply to preconviction and postconviction requests for substituted counsel. The Supreme Court held "the standard expressed in *Marsden* and its progeny applies equally preconviction and postconviction." (*Id*. at p. 694.)

After defendant's opening brief and respondent's brief were submitted, our Supreme Court issued its decision in *People v. Sanchez* (2011) 53 Cal.4th 80 (*Sanchez*), addressing the question of when a trial court's duty to conduct a *Marsden* hearing is triggered and the common practice of appointing "'conflict'" counsel. (*Sanchez*, at pp. 91-92.) In *Sanchez*, at the sentencing hearing, the defendant's deputy public defender told the trial court that the defendant "'wishe[d]'" to have the public defender "'explore having his plea withdrawn.'" (*Id*. at p. 85.) The trial court asked if this was something counsel could do or whether it had to appoint "'conflict counsel.'" (*Ibid*.) Appointed counsel responded "'conflict counsel cannot be appointed'" until the trial court held a *Marsden* hearing and declared a conflict. (*Sanchez*, at p. 85.) At the next hearing, the trial court appointed "'conflict counsel for the sole purpose of looking into the motion to withdraw [defendant's] plea.'" (*Ibid*.) When "'conflict'" counsel reported that he found no basis for such a motion, the trial court confirmed the public defender's continued representation of defendant and proceeded with sentencing. (*Id*. at p. 86.) The Court of Appeal reversed, finding *Marsden* error. (*Sanchez*, at p. 86.) The Supreme Court affirmed the appellate court's judgment. (*Id*. at p. 93.)

The Supreme Court in *Sanchez* reiterated that a *Marsden* hearing is required only when "there is 'at least some clear indication by defendant,' either personally or through his current counsel, that defendant 'wants a substitute attorney.'" (*Sanchez, supra*, 53 Cal.4th at pp. 89-90.) The Supreme Court then determined that defense counsel had so indicated (*id*. at p. 92), by requesting the "'appointment of substitute counsel to investigate the filing of a motion to withdraw [the] plea on [the defendant]'s behalf.'"

(*Id*. at p. 86.) "[D]efendant, through counsel, requested that a 'conflict' or substitute attorney be appointed immediately, and the obvious implicit ground for that request was the incompetency of defendant's currently appointed counsel." (*Id*. at p. 91.) Accordingly, the Supreme Court agreed with the Court of Appeal that the trial court should have conducted a *Marsden* hearing to determine whether or not appointed counsel should be relieved and substitute counsel appointed. (*Sanchez*, at pp. 92-93.)

While the Supreme Court and appellate court agreed that defense counsel had given a sufficiently clear indication that defendant wanted a new lawyer, triggering a *Marsden* hearing, the Supreme Court expressly disapproved other cases decided by that appellate court[4] and also *Sanchez* to the extent they "incorrectly implied that a *Marsden* motion can be triggered with something less than a clear indication by a defendant" or his counsel that the defendant "'wants a substitute attorney.'" (*Sanchez, supra*, 53 Cal.4th at p. 90, fn. 3.) In the disapproved cases, the appellate court implicitly, if not explicitly, held that a defendant's expressed desire to make a new trial motion or motion to withdraw a plea on the basis of claimed ineffective assistance of counsel, without more, should be treated as a *Marsden* motion, triggering *Marsden* hearing requirements. (See, e.g., *Mejía, supra*, 159 Cal.App.4th at p. 1086 [although defendant made no request for substitute or even "conflict" counsel, the trial court nevertheless concluded that the defendant had made a *Marsden* motion because he had "instructed his counsel to move

[4] *People v. Mendez* (2008) 161 Cal.App.4th 1362 (*Mendez*); *People v. Mejía* (2008) 159 Cal.App.4th 1081 (*Mejía*); *People v. Eastman* (2007) 146 Cal.App.4th 688.

for a new trial largely on the basis of his counsel's performance at trial and that his counsel so informed the trial court"].)

The Supreme Court also specifically disapproved the practice of appointing "'conflict'" counsel. Under that practice, conflict counsel would enter the case only to determine whether the defendant had grounds to seek relief on the basis of ineffective assistance of counsel and, if he or she determined such grounds existed, to pursue such relief. At the same time, previously appointed defense counsel remained counsel of record for all other trial court matters. (*Sanchez, supra,* 53 Cal.4th at pp. 84-85, 88-89.) The *Sanchez* court agreed with the Court of Appeal that "'[t]he proper procedure [under *Marsden*] does not include the appointment of "conflict" or "substitute" counsel to investigate or evaluate the defendant's proposed new trial or plea withdrawal motion.'" (*Id*. at p. 89.) As did the appellate court, the Supreme Court viewed use of such specially appointed counsel as an abandonment by the trial court of its responsibility to hear ineffective assistance of counsel claims and exercise its discretion to determine whether substitute counsel should be appointed. (*Id*. at pp. 89-90.)

Here, prior to sentencing, defendant's trial counsel expressed that defendant desired to move for a new trial based on specific grounds of ineffective counsel during jury selection and trial. Defendant's trial counsel explained that he would have to "declare a conflict and have [conflict attorney] appointed." The prosecutor also noted, "I guess at this point we'd have to get a conflict's attorney." However, the trial court never sought any explanation from defendant, and defendant never interjected. Nonetheless, like in *Sanchez*, defendant, through his trial counsel, indicated that defendant wanted

substitute counsel appointed immediately. (*Sanchez, supra,* 53 Cal.4th at p. 91 ["defendant, through counsel, requested that a 'conflict' or substitute attorney be appointed immediately"]; *People v. Reed* (2010) 183 Cal.App.4th 1137, 1145-1146 [combination of the defendant's "expressed desire to pursue a motion for new trial based on counsel's incompetence, the fact that defense counsel said, 'I cannot make it for him,' and the context of [the defendant]'s prior unsuccessful *Marsden* motions, made it sufficiently clear that [he] was in fact requesting substitute counsel to pursue the motion for new trial"].)[5]

The People maintain that the facts of this case "parallel those presented" in *Richardson, supra,* 171 Cal.App.4th 479 and *People v. Dickey* (2005) 35 Cal.4th 884 (*Dickey*). In our view, however, *Dickey* and *Richardson* are inapposite.

In both *Dickey* and *Richardson,* the courts failed to conduct *Marsden* hearings regarding the defendants' complaints of the inadequacy of their counsels' performances during trial, but appointed separate counsel to investigate the defendants' claims to determine whether there were any bases for filing motions for new trial on such grounds. (*Dickey, supra,* 35 Cal.4th at p. 918; *Richardson, supra,* 171 Cal.App.4th at p. 485.) The separately appointed counsel in *Richardson* concluded there were no such grounds.

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[5] To the extent *Reed* suggests a *Marsden* hearing is triggered merely by a defendant's expressed desire to make a new trial motion on the basis of ineffective assistance of counsel, without more (see *Reed, supra,* 183 Cal.App.4th at pp. 1146-1147 [citing the disapproved decisions in *Mendez* and *Mejía*]), it has also been effectively disapproved by *Sanchez*. (*Sanchez, supra,* 53 Cal.4th at p. 90, fn. 3 [expressly identifying *Mendez* and *Mejía* as incorrectly implying a *Marsden* hearing can be triggered by something less than a "clear indication" the defendant wants a "'substitute attorney'"].)

(*Richardson*, at p. 485.) In *Dickey*, a death penalty case, the separately appointed counsel filed a motion for new trial based on ineffective assistance of counsel and the trial court's failure to hold a *Marsden* hearing, which the *Dickey* court denied. (*Dickey*, at p. 920.) In addition, in *Dickey*, defense counsel clearly framed the matter as a request for separate counsel, not substitute counsel. He also made it clear that the idea for the request came from him, not the defendant. Defense counsel further told the trial court that what he sought was "not really a pure *Marsden* hearing." (*Id*. at p. 918, fn. 12.) The trial court, in denying the motion for new trial, found, as to the defendant's *Marsden* claim, that the defendant had not asked for a *Marsden* hearing. (*Id*. at 920.)

On appeal in both *Dickey* and *Richardson*, the defendants claimed their complaints below were sufficient to trigger the respective obligations of the trial courts to hold *Marsden* hearings with regard to whether they should have relieved their originally appointed counsel and appointed new counsel for the penalty phases. (*Dickey*, *supra*, 35 Cal.4th at p. 918; *Richardson*, *supra*, 171 Cal.App.4th at p. 485.) The courts found no error in that the defendants had not expressly requested substitute counsel be appointed for the penalty phases. (*Dickey*, at p. 920; *Richardson*, at p. 485.) Since the defendants' expressed wishes for new counsel to investigate the bases for filing a motion for new trial on the grounds of ineffective assistance of counsel were granted, the courts concluded that the defendants had no valid grounds for complaint. (*Dickey*, at pp. 920-921; *Richardson*, at p. 485.)

The Supreme Court in *Dickey* explained that "'"[a]lthough no formal motion is necessary,"'" the defendant failed to clearly state that he wanted a substitute counsel appointed for the penalty phase. (*Dickey*, *supra*, 35 Cal.4th at p. 920.) "To the extent he made his wishes known, he wanted to use counsel's assertedly incompetent performance in the guilt phase as one of the bases of a motion for new trial, and he wanted to have separate counsel appointed to represent him in the preparation of such a motion. As his expressed wishes were honored, he has no grounds for complaint now." (*Id*. at pp. 920-921.)

We find *Dickey* and *Richardson* distinguishable in that the trial courts appointed separate counsel to investigate the defendants' claims of inadequacy of counsel during trial and whether those allegations would support viable motions for new trial. (*Dickey*, *supra*, 35 Cal.4th at p. 920; *Richardson*, *supra*, 171 Cal.App.4th at p. 485.) In addition, in the instant case, unlike in *Dickey* and *Richardson*, the trial court never gave defendant an opportunity to address it directly. (*Dickey*, at p. 919; *Richardson*, at p. 485.) Further, like in *Sanchez*, defendant's trial counsel's statements clearly indicated that defendant wanted substitute counsel. In *Dickey*, by contrast, it cannot be said that the defendant clearly indicated that he wanted substitute counsel appointed because (1) counsel expressly told the trial court that the defendant was asking for the appointment of separate counsel to bring the motion for new trial; (2) defense counsel told the court the request for substitute counsel came from defense counsel and not defendant; and (3) defendant was not seeking a "pure" *Marsden* hearing. (*Dickey*, at p. 918, fn 2.)

The final question before us is whether the trial court's error was prejudicial. As explained in *Sanchez, supra,* 53 Cal.4th at page 92, we conclude it was. "[I]t was prejudicial error to deny the defendant the opportunity to explain the basis for his claim because a trial court that 'denies a motion for substitution of attorneys solely on the basis of [its] courtroom observations, despite a defendant's offer to relate specific instances of misconduct, abuses the exercise of [its] discretion to determine the competency of the attorney' [citation], and, in that case, we could not 'conclude beyond a reasonable doubt that this denial of the effective assistance of counsel did not contribute to the defendant's conviction.' [Citation.]"

Thus, on remand, the trial court should conduct a hearing in order to inquire sufficiently into defendant's grounds for asserting ineffective assistance of counsel. In compliance with the authorities herein cited, the trial court should permit defendant to personally express his concerns and allow defense counsel to respond. (*Sanchez, supra,* 53 Cal.4th at p. 92.)

III

DISPOSITION

The judgment is reversed and the matter is remanded with the following directions: (1) the trial court shall hold a hearing on defendant's *Marsden* motion; (2) if the trial court finds that defendant has shown that a failure to replace his appointed attorney would substantially impair his right to assistance of counsel, the trial court shall appoint new counsel to represent him and shall entertain such applications as newly appointed counsel may make; and (3) if newly appointed counsel makes no motions, any

motions made are denied, or defendant's *Marsden* motion is denied, the trial court shall reinstate the judgment.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.